In the United States Circuit Court of Appeals for the Ninth Circuit

FRANK E. WHELPLEY,

Appellant.

vs.

ANDREW GROSVOLD,

Appellee.

Upon Appeal from the District Court For the Territory of Alaska, Third Division.

BRIEF FOR APPELLANT.

J. LINDLEY GREEN and
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STATEMENT OF CASE

This action was brought by appellee, to enjoin appellant from entering upon Little Koniuji Island and removing foxes therefrom or in any way interfering with appellee in holding possession thereof.

Little Koniuji Island is a small island in the Shumagin Group, situated on the west side of the Alaska Peninsula in South Western Alaska.

Said Island has been occupied continuously since the year 1892, and perhaps long prior to that time, exclusively for the purpose of propogating

foxes thereon; just who the occupants were prior to the year 1902 is not clear but at that time the N. C. Company was in possession thereof, and the owner of the foxes and improvements thereon, and in that year sold the foxes and improvements thereon and its possessory right thereto, to one Lawrence Reid and the said Lawrence Reid held the possession of said island and was the owner of the foxes and improvements situated thereon and occupied it, exclusively, for the purpose of propogating foxes thereon until July eighth, 1913, at which time he sold the foxes and all improvements thereon and his possessory right to said island to appellant, Frank E. Whelpley, and at that time delivered to said Whelpley the possession of said island and the improvements and foxes situate thereon, the said Whelpley paying the sum of four thousand dollars therefor. The said Whelpley taking title thereto in his own name, in trust, however, for the Provincial Fox Company, a corporation, incorporated under the laws of New Brunswick in the Dominion of Canada, said company having furnished the funds with which to make said purchase.

The appellee, Andrew Grosvold, bases his right to said island and to the injunction prayed for upon a purported lease, dated July 30th, 1914, which he claims was issued to him by the United States of America through the department of Commerce and Labor.

The suit was filed March 20th, 1916 and a temporary injunction was granted on the 27th day of March, 1916, Appellant, Defendant in the district court, filed his demurrer to plaintiff complaints up-

on the grounds "that said complaint does not state facts sufficient to constitute a cause of action." See page eleven of record.

On the twenty-eighth day of March, said demurrer was overruled by the court, page 12 of of Record, to which ruling of the court Appellant duly excepted and exception allowed.

On April 12th, Appellant filed his answer to Appellee's complaint denying the validity of the purported lease, or any right of Appellee to the possession thereof, or the foxes and improvements situated thereon, and affirmatively alleging possession of said island in himself, his right to the possession thereto, how acquired, and his ownership in the foxes and improvements situated thereon. See answer pages 13 to 21 inclusive of record.

On July eighth, 1916, the cause was tried before the Honorable Fred M. Brown, Judge at Valdez, Third Division, of the Territory of Alaska, and on the second day of August 1916, the said Judge filed his opinion, which was adverse to this Appellant, and on the twelfth day of August, 1916, the findings of fact and conclusions of law and the judgment was signed by the court and duly entered; from which said judgment this Appellant is prosecuting this appeal, ON THE GROUNDS ASSIGNED IN HIS ASSIGNMENT OF ERROR.

SPECIFICATION OF ERROR.

We present the following specifications of error:

I

The Court erred in overruling the demurrer interposed and filed by said defendant to the complaint of the plaintiff on the ground that said complaint

did not state facts sufficient to constitute a cause of action.

II

The Court erred in overruling the objections of the defendant made at the commencement of the trial of said cause to the introduction of any evidence offered by the Plaintiff in said cause upon the grounds stated in said objection. The said objection and the ruling of the Court thereon as shown by the record of the Court reporter, are as follows, to-wit:

DIRECT EXAMINATION BY MR. JAMES.

Q. State your name and residence.

A. Andrew—

MR. GREEN. At this time we wish to object to the introduction of any evidence in this case for the reason that the lease was granted without any authority of law and for the further reason that if there was any authority of law for granting the lease on these islands that the Secretary of Commerce has exceeded his authority in granting the lease in the manner and form in which he did and for that reason the lease is void and he has no rights; and for the further reason that the proper form of action has not been brought, that this is an action to quiet title, when our statute provides (211) that in bringing an action to quiet title the person must be in possession and it is necessary to plead that possession; in this case he has not shown such possession as would entitle him to bring an action to quiet title —ejectment would be the proper action.

MR. WOOLEY. This is not an action to quiet title, but for a permanent injunction.

The objection was by the Court overruled and defendant allowed an exception to the ruling.

III

The Court erred in permitting the introduction in evidence by the plaintiff at the trial of said cause of an exhibit marked Plaintiff's Exhibit "A" and in permitting the Plaintiff to testify concerning the same. The questions propounded, the answers there to, the objections of the Defendant and the ruling of the Court upon such objections as shown by the record are as follows, to-wit:

Q. I show you this lease (handing witness paper) and ask you if that is your signature and the lease that resulted from the bid? Look at the signature on the last page, and tell us if that is your signature.

A. Yes, that is my signature.

MR. JAMES. We ask for the Court to take judicial knowledge of the signature of Edwin T. Sweet, acting for the Department of Commerce and Labor in executing this lease, and we offer it in evidence.

MR. GREEN. We object to its introduction in evidence for the reason that the lease is void in that there is no law whereby that Department is given the privilege of granting leases and if the Court should even find that there was some statutory authority for it, that this lease is not a lease that should be granted and that the department had no authority to grant a lease in the manner which they granted this, by advertising for bids, crippling and interfering with an industry which the statute was intended to foster and encourage.

THE COURT. I am not assuming at this time to pass on that question, that is really the question to be determined in the trial of this case. The objection will be overruled.

Defendant allowed an exception to the ruling. The lease is admitted in evidence, marked Plaintiff's Exhibit "A"—a copy is attached hereto and made a part hereof.

IV

The Court erred in overruling Defendant's objections to the introduction of an exhibit marked Plaintiff's Exhibit "B" introduced by the Plaintiff at the trial of said cause. The questions propounded, the answer of the Plaintiff thereto, the objections of Defendant and the rulings of the Court upon such objections as shown by the record being as follows, to-wit: (212).

Q. What was the rental value of that property, the Little Koniuji Island? How much per year?

A. The department offered the lease for at least $200 per year.

Q. And what was your bid for it?

A. $205.00.

Q. Did you pay that rent?

A. I paid that rent to the department.

MR. JAMES. We offer this receipt in evidence being a receipt from the department for the first year's payment on this lease.

MR. GREEN. We make the same objection.

Objection overruled; Defendant allowed an exception. The receipt is admitted in evidence, marked Plaintiff's Exhibit "B"; copy is attached hereto and made a part hereof.

V

The Court erred in permitting the Plaintiff to testify concerning the Defendant's possession of a certain Island the title to which was disputed herein. The questions propounded, the testimony of the plaintiff, the objections of Defendant and the rulings of the Court upon such objections as shown by the record being as follows, to-wit:—

Q. Did the Defendant, F. E. Whelpley, at any time have possession of Little Koniuji Island?

MR. GREEN. We object; he has not shown whether or not he is prepared to answer the question; he has not laid the foundation.

BY THE COURT. You may ask him if he knows. Objection overruled.

Q. Answer the question.

A. I understood that he had possession of the island, acting for the Fundy Fox Company.

MR. GREEN. We move to strike the answer as not responsive to the question.

Motion denied, Defendant excepts.

MR. GREEN. Also, it is not shown he knows.

THE COURT. Do you know that he was ever there? That Mr. Whelpley was in possession there?

A. Yes, your Honor, acting for the Fundy Fox Company.

Objection overruled; Defendant excepts.

VI

The Court erred in permitting the Plaintiff to introduce exhibits marked Plaintiff's Exhibits "C" and "D" over the objection of the Defendant. The questions propounded, the testimony of the Plaintiff, the objections of the Defendant, and the rulings

of the Court upon such objections as shown by the record being as follows:

Q. When did you first meet Mr. Colwell?

A. I met him the 18th day of March, 1914.

Q. Where did you meet him?

A. Sand Point.

Q. In what connection did you meet him?

A. He was introduced by letter from the Fundy Fox Company as their agent in their Alaska business and also held a letter of introduction from the company to present to me (213).

MR. JAMES. We offer in evidence these letters from the Fundy Fox Company to Andrew Grosvold.

MR. DIMOND. We object to them as incompetent, irrelevant and immaterial and not having been signed. And there is no proof offered that this company is in existence and they cannot be introduced under the law to bind the Defendant. In the first place, it does not identify this particular island or have any reference to it, and in the second place, there is no testimony that there is such a company in existence as the Fundy Fox Company—it is incompetent evidence.

THE COURT. I don't know what its effect or weight may be at this time. These rulings will be considered as pro forma rulings and at the conclusion of the case, any motion to strike testimony that is not relevant may be made and will be granted. At this time I cannot see the relevancy of it, neither can I say it has no purpose or relevancy. The objection will be overruled and exception allowed.

The letters are admited as Plaintiff's Exhibits

"C" and "D"; copies are attached hereto and made a part hereof."

VII

The Court erred in overruling the objections of Defendant to the testimony of Plaintiff concerning conversations he had with Mr. Colwell. The questions propounded, the testimony of the Plaintiff, the objections of Defendant, and the ruling of the Court upon such objections as shown by the record being as follows, to-wit:

Q. Did you have any conversation with Mr. Colwell regarding the Little Koniuji Island?

A. Yes, sir.

Q. State what that conversation was.

MR. DIMOND. We object to that on the ground that there has been no proof offered in evidence that Mr. Colwell had any right whatever to bind this Defendant or was in any manner an agent of the Defendant.

THE COURT. It seems as though this was a little bit anticipating the defense. If you rely upon the lease here, it would seem that would be sufficient until there was some evidence offered on the part of the Defendant.

MR. WOOLEY. We are willing to rely upon our lease as to the island, but as to the foxes on the island, we want to show that Grosvold acquired title through a subsequent arrangement with Colwell. ** *****

MR. GREEN. We would like to object on the same grounds, that it is not shown that Colwell had anything to do with the island.

Objection overruled, Defendant allowed an exception.

VIII

The Court erred in permitting the Plaintiff to introduce over the objection of Defendant an exhibit marked Plaintiff's Exhibit "G", introduced by the Plaintiff at the trial of said cause. The questions propounded, the answer of the Plaintiff thereto, the objections of Defendant and the rulings of the Court upon such (214) objections as shown by the record being as follows:

"MR. JAMES. We want to offer in evidence the articles of incorporation of the Fundy Fox Company to show that the witness is wrong.

THE WITNESS. I don't know anything about the Fundy Fox Company, whether they are incorporated or not; they were not when I left them, when I left them as a partner.

Q. When was that?

A. The 17th day of January, 1914.

MR. JAMES. We offer these articles of incorporation of the Fundy Fox Company, and we offer this statement with the articles.

MR. DIMOND. We object to this. This is an incorporation organized under the laws of the State of Maine, and there is nothing to show any connection between this incorporation and the limited copartnership to which the witness has testived.

THE WITNESS. I have my release from Mr. Williams and Mr. Baker and the Fundy Fox Company partnership.

THE COURT. Do you know anything about this corporation?

A. No, sir.

THE COURT—Did you ever hear of it before?

A. No, sir.

MR. JAMES. Do you know Mr. Williams?

A. I do.

Q. Weren't you interested with him in the Fundy Fox Company?

A. Not in no Fundy Fox Company, incorporated, no, sir.

THE COURT. They will be admitted for what they are worth. Geo. W. Barker, was he your partner in the Fundy Fox Company?

A. Yes, sir.

MR. JAMES. The purpose of presenting these articles at this time and the certived copy of that statement was because the witness on direct examination testified distinctly that the Provincial Fox Company dealt in blue foxes exclusively whereas the Fundy Fox Company dealt in the black and cross foxes, in other words limiting the Fundy Fox Company to other than blue foxes.

THE COURT. This will be admitted as a matter going to the credibility of the witness.

Defendant allowed an exception to the ruling.

The articles of incorporation, with the statement referred to attached, are admitted in evidence, marked Plaintiff's Exhibit "G"; copy is attached hereto and made a part hereof.

IX

The Court erred in sustaining plaintiff's objections to a question propounded to plaintiff by counsel for the Defendant. The question propounded, the objections of Defendant and the rulings of the

Court upon such objection as shown by the record, being as follows, to-wit:

"Grosvold recalled by Mr. Dimond.

Q. Have you not received information from the Department of Commerce recently that they have abandoned their method of leasing this little Koniuji Island and other fox islands by calling for bids and they intend hereafter to lease the islands to the parties in possession?

MR. JAMES. We object to that as incompetent, irrelevant and immaterial.

Objection sustained; Defendant allowed an exception.

X

The Court erred in refusing to adopt and make and enter (215) the Findings of Fact and Conclusions of Law and Decision herin, to which refusal the Defendant duly excepted and the exception was allowed.

XI

The Court erred in making, filing and entering its Findings of Fact and Conclusions of Law, made, filed and entered herein on the 12th day of August, 1916, over the exception to the same made by the defendant, which said exceptions were duly allowed by the Court.

XII

That the Court erred in making, filing and entering its judgment and decree herein, made filed and entered on the 12th day of August, 1916, for the following reasons:

(1) The complaint did not state facts sufficient to constitute a cause of action (a) for the

reason that Appellee had at that time and has now, a plain speedy and adequate remedy at law, (b) The complaint does not allege that the Appellee (Plaintiff below) was in possession of the island, or that Appellant, (Defendant below) was not in possession, or that the foxes Appellant was removing from the island was the property of Appellee or that he was being injured in the removal of the foxes or that Appellee was entitled to the possession of the foxes that Appellant was removing from the island, or that they were not the property of Appellant. (c) The complaint fails to set out specifically in what way, if any, he was injured by the alleged trespass of Appellant, or to show specifically that he had no plain speedy and adequate remedy at law.

(2). That the purported lease upon which Appellee based his cause of action was, and is void (a) because the department of Commerce and Labor had no authority to grant said lease, (b) That if the Department of Commerce and Labor did have authority to lease said island, it did not have authority to grant a lease to Appellee or to anyone that was not in actual possession of said island and using and occupying it for the purpose of propagating foxes thereon, (c) That Appellant being in the peaceable and undisputed possession of said island at the time the purported lease was granted and he having tendered to the Department the minimum amount for which said island was offered to be leased, the Department of Commerce and Labor had no authority to grant the lease to anyone else.

(3) That the Decree is erroneous for the rea-

son that it did not give Appellant a reasonable time to remove his property, which the undisputed evidence shows belonged to him consisting of some seventy-five pair of blue foxes (one hundred and fifty foxes) worth between nine and ten thousand dollars and other improvements situated thereon.

THE ARGUMENT.

We will first consider the contention that the complaint does not state facts sufficient to constitute a cause of action.

The Appellee (Plaintiff below) has attempted to invoke the extraordinary remedy of injunction.

It is our contention that before a court of equity will assume jurisdiction where this drastic remedy is sought; the complaint must affirmatively state in clear and unequivocal terms every essential fact, in clear and concise language, necessary to show that plaintiff is entitled to the relief sought and in addition thereto that there is no plain, speedy and adequate remedy at law.

In this case the complaint does not allege that Plaintiff was in possession of Little Koniuji Island or that he ever entered into possession thereof under his purported lease or otherwise or that he was ever in possession of said island. Neither does the complaint allege that Appellant is not in possession of said island or that he is not entitled to the possession thereof, neither does the complaint charge that Appellant unlawfully entered upon said island.

Paragraph 5 of the complaint, page 2 of record states: "That on or about the fifteenth day of November, 1915 Plaintiff stocked said island with seven

pair of blue foxes and placed a keeper in charge thereof."

But that allegation does not state that Appellee entered into possession of the island. It does not state that Appellee maintained a keeper thereon, or that Appellee had a keeper on the island at the time the action was brought. In fact, there is nothing in the complaint that can be construed to infer that Appellee was ever in possession of the island.

We also find, as above stated, no allegation that Appellant was not in possession or was not entitled to possession; In paragraph six of the complaint, Appellant is referred to as trespassing in the following language (Page 3 of record) "and said Defendant threatens to repeat said trespass and threatens to injure Plaintiff if Plaintiff in any wise interferes with said trespass of Defendant."

This is the first time the word trespass is used in the complaint, but it uses the words "said trespasses," therefore, it is only a vague and indefinite conclusion if at all and not an affirmative allegation; Neither does it state in what way Appellant has trespassed, if at all. We also find in paragraph eight of the complaint, (page 3 of record) the word trespass is again used in the following language: "That Plaintiff is deprived of all use of said island by reason of said trespass and said threat of injury; and is wholly without means of ascertaining the number and value of the foxes so trapped and appropriated by said Defendant and will ever be unable to determine the damage of future trespasses which are now theratened." The word trespass as here used is also a conclusion and not an allegation.

It is very apparent that the words trespass as used in each instance are simply conclusions as distinguished from allegations of fact necessary to constitute a cause of action; we call the attention of the Court to the fact that the allegation, "That Plaintiff is deprived of all use of said island by reason of said trespasses," creates a strong presumption that Appellant is in possession of said island and that Appellee is wholly out of possession; and this conclusion becomes more forcible in view of the fact that the complaint nowhere alleges that Appellee is in possession, or that Appellant is not in possession thereof.

In support of this contention we call attention to paragraph seven of said complaint, (page 3 of record) which reads:

"The Defendant first entered upon said island contrary to the rights of Plaintiff on or about the month of September, 1914, and trapped approximately thirty-five pair of blue foxes, and appropriated them to his own use to the great damage of Plaintiff, said foxes being on said island when leased as aforesaid by Plaintiff."

This allegation clearly shows that the island was stocked with Blue Foxes at the time Appellee claims to have leased it from the Government, the last clause of the paragraph reads: "Said foxes being on said island when leased as aforesaid by Plaintiff."

A careful examination of said purported lease clearly shows that if the lease is not valid it in no way gives Appellee any right to the foxes thereon. At the time the lease was granted (see copy of lease,

pages 5 to 10 inclusive of record). It also becomes apparent from an examination of the complaint, that it nowhere states that the Appellee is the owner of said foxes or entitled to them. Although it states that Plaintiff was damaged by their removal, he does not explain in what way he was damaged, the statement is a conclusion not supported by any allegation of fact in the complaint.

It is a fact of current knowledge well known in Alaska that there are no Blue Foxes native to Alaska but have been imported to Alaska and propagated here and are domesticated, the same as horses, cattle, sheep or any other domestic animal, and the fact that the complaint alleges that the foxes trapped by Appellant which were on the island when Appellee leased it were "Blue Foxes" and does not affirmatively allege that they were wild foxes, having no owner, raises the presumption that they are owned by some one; and the complaint failing to allege that Appellee was the owner, clearly raises the presumption that Appellant is the owner and that he was, to say the least, in constructive possession of the island, and that in trapping said foxes he was not trespassing but entering upon the island to remove some of his property which he had a perfect right to do. The law always presumes that the acts of a person in the ordinary transaction of affairs is legal until the contrary is shown, which said complaint fails to do.

The complaint states in paragraph five that on November 15th, 1915, Plaintiff (Appellee) stocked said island with seven pair of Blue Foxes (14 foxes)

and in paragraph six of said complaint (pages 2 and 3 of records) it states:

"That Defendant on or about the sixteenth day of December 1915 entered upon said island in company with John Gardner, Conrad Syvesten, Govin Stewart and John Polatoff without the consent of the Plaintiff, and trapped many of the said foxes and appropriated them to his own use to the great damage of the Plaintiff; and on the nineteenth day of December, 1915, said Defendant landed again on said island and trapped and appropriated many of said foxes to his own use and without the consent of the Plaintiff and to the Plaintiff's great damage, and on many occasions thereafter, too numerous to mention Defendant and his agents have come on said island without Plaintiff's consent and have trapped foxes thereon and Defendant has appropriated the same to his own use."

According to the above allegation, Appellant (Defendant below) landed on said island, on two occasions, one of which was less than a month after Appellee in his complaint alleges he stocked said island with seven pair of foxes, and the second occasion a few days over a month thereafter, and alleges that on each occasion Defendant trapped many of said foxes, and on many occasions thereafter, too numerous to mention, Defendant landed and trapped many of said foxes. The complaint does not state how many foxes it would require to constitute a great many but it certainly could not be claimed that seven pair of foxes are a great many. The logical conclusion to be drawn from the above paragraph is that there were a great many Blue Foxes on the is-

land when Appellee placed the seven pair thereon, otherwise Appellant could not have removed so many, and Appellee having only placed seven pair of foxes thereon Appellant had removed all of the seven pair, therefore, Appellee had nothing on the island when he brought the injunction proceeding and there is no grounds upon which a Court of Equity could take jurisdiction. His remedy was an action at law for damages. While said complaint by inference clearly indicates that there were a great many Blue Foxes on the island at the time Appellee claims he stocked it with seven pair of Blue Foxes. Appellee makes no showing of ownership other than the seven pair, yet it does not appear that he placed any mark on those he placed there or that there was any way of distinguishing them from those already on the island, and he not being the owner of the Foxes already there, if he deliberately mingled his foxes with those belonging to Defendant (Appellant herein) he certainly cannot enjoin Defendant (Appellant) from removing his own foxes, because, per chance Appellant might remove some of Appellee's foxes because he was unable to distinguish them from his own but through no fault of Appellant.

For the reasons above stated we urge that Defendant's (Appellant's) demurrer should have been sustained.

We furtehr urge that Defendant's demurrer to the evidence at the beginning of the trial just after the first witness was sworn but before any evidence was given (see pages 28 and 29 of record) should have been sustained; Defendant's answer (see pages 13 to 21 inclusive of record) clearly shows that if

Appellee has any cause of action it is at law and not in equity.

We are not disputing the fact that if a Court once acquires jurisdiction in equity, it acquires it for all purposes, and can consider and decide the questions at law involved in the case, as well as questions of equity, but it is our contention that the Court never acquired jurisdiction in equity and not having acquired that jurisdiction the answer, which clearly showed that if Plaintiff (Appellee herein) had any cause of action, it was an action at law; did not confer either legal or equitable jurisdiction upon the Court, and the Court not having acquired jurisdiction, had no right to proceed with the trial, neither did it acquire jurisdiction by proceeding with the trial, over our objection above referred to , which was timely made at the beginning thereof.

In support of our contention we respectfully call attention to the following authorities:

Section 44, pages 340 and 341, vol. 14, Ruling Case Law. We quote that part of said section beginning with the last word in line four, page 341 as follows:

> "But equity is chary of its powers, and ordinarily employs them only when the impotent or tardy process of the law does not afford that complete and perfect remedy or protection which the individual may be justly entitled to. When there is a choice between the ordinary process of the law and the extraordinary remedy by injunction and the legal remedy is sufficient, an injunction will not be granted."

Phoenix Mutual Life Insurance Company vs. Bailey, 13 Wall 616—20 U. S. (L. ed.) 501.

Grand Chute vs. Winegar, 15 Wall 353, 21 U. S. (L. ed.) 174.

Francis vs. Flinn, 118 U. S. 382— 30 U. S. (L. ed) 165.

Shelton vs. Platt, 139 U. S. 591—35 U. S. (L. ed) 273.

Allen vs Pullman Palace Car Co., 139 U. S. 658 —35 U. S. (L. ed) 303.

Locassagne vs. Chopuis, 144 U. S. 119—36 U. S. (L.ed) 368.

Pittsburg, etc., R. Co. vs. Board of Public Works 172 U. S. 32—43 U. S. (L. ed) 354.

Cruikshank vs. Bidwell, 176 U S. 73—44 (L. ed) 377.

Black vs. Jackson, 177 U. S. 349—44 (L.ed.) 801.

Potts vs. Hollen, 177 U. S. 365—44 (L.ed) 808.

That our code gives Appellee a plain speedy, and adequate remedy at law there can be no doubt, Chapter Thirty-two; Page 470 compiled laws of Alaska, which is an act passed by Congress June 6th, 1900 makes ample provision for acquiring possession with damages and Chapter forty-one, page 492 provides for injunction pendante lite and we contend that his complaint on its face shows that an action for possession was his remedy but that the complaint fails to state facts sufficient to give the Court jurisdiction under that Act, neither does it state facts sufficient to give the Court equitable jurisdiction but on the contrary shows on its face that the court has no jurisdiction in equity, and the court having acquired neither legal or equitable

jurisdiction our demurrer to the complaint should have been sustained and the court having overruled the demurrer to the complaint, our demurrer to the evidence should have been sustained, and upon the trial the court should have denied Plaintiff (Appellee) any relief and dismissed the action.

We are not unmindful of the fact, that the distinction between actions at law and suits in equity and the forms of all such actions and suits, are abolished, and that all actions are denominated civil actions, but as this Court has repeatedly held, it is simply the distinction between the actions that is abolished; but the distinction between Law and Equity still remains, an attempt to abolish that distinction would be unconstitutional, but over statute expressly provides for legal actions and equitable actions thereby affirming the distinction.

It was the intention of Congress by that Act to brush away the cobwebs that had accumulated around the two froms of actions and to simplify the proceedings but not to take away the substance. Section 889, page 394 compiled laws of Alaska provides: "The complaint shall contain, First, the title of the cause, specifying the name of the Court and the name of the parties, Plaintiff and Defendant. Second, a plain and concise statement of the facts constituting the cause of action without unnecessary verbage."

It is evident that this section of the statute makes it just as essential that a complaint should state every material and jurisdictional fact as it was at common law.

The complaint in this case having failed to state sufficient facts to clearly indicate to the Court that

Plaintiff was without an adequate remedy at law, was not sufficient to give the court jurisdiction in equity, and Defendant, Appellant, having objected to the proceedings at every stage thereof, did not waive his right to a jury trial, although, he did not demand a jury in so many words, he saved his rights at every stage of the proceedings, by demurrering to the complaint, objected, to the Court hearing any evidence on part of Plaintiff, at the beginning of the trial and demurrered to Plaintiff's evidence when he rested his case, and insisted at all times that the Court was without jurisdiction to try the case: Had the Court sustained our demurrer to the evidence, Plaintiff, Appellee, would have pursued his remedy at law and automatically the case would have been placed on the law side of the calandar with the jury cases and tried by jury; but the complaint neither stated an action at law or a suit in equity we insist that we pursued the proper course and have not waived our right to a trial by jury.

In support of our contention we call the attention of the Court to the following cases decided in the Supreme Court of the United States:

Black v. Jackson, supra, and Potts v. Holland, supra, in Black v. Jackson, Defendant filed an answer in which a jury trial was demanded, but the answer was withdrawn to perimt the Defendant to demurrer to the complaint, and the demurrer having been overruled the Defendant filed an amended answer in which there was no mention of a right to a jury trial. Plaintiff demurrered to Defendant's answer and the demurrer was sustained. Defendant stood on his answer and judgment was ren-

dered against him, granting a manditory injunction, this judgment was upheld by the Supreme Court of Oklahoma and Defendant appealed to the Supreme Court of the United States; Judge Harlan in rendering the opinion of the Court said: "We are of the opinion that the case made out by the Plaintiff was not such as to entitle him to a mandatory injunction and that the Court of Original jurisdiction errored in determining the case without a jury. The decree of the Supreme Court of the Territory is therefore reversed and the case is remanded with directions to set aside the decree and for such further proceedings as will be consistent with law and this opinion."

The case of Potts vs. Hollen was the next case on the calendar in the Supreme Court of the United States. The facts are practically the same except the Defendant made no mention of a right to trial by jury at any stage of the proceeding and there was no demurrer to the answer. The Plaintiff filed a reply denying each and every material allegation in the Defendant's answer. When the plaintiff rested the Defendant demurred to the evidence upon two grounds.

(1). It did not sustain the allegations of the petiton.

(2). It did not show that the plaintiff had a cause of action. The demurrer was overruled and exception to the action of the Court being taken, the Defendant stood upon the demurrer and introduced no evidence. The trial Court without a jury rendered a judgment for the Plaintiff. The Supreme Court of the United States reversed the case. Judge Har-

lan speaking for the Court used the following language:

"For the reason stated in the opinion in Black vs. Jackson just decided (177 U. S. 349) ante, 20 sup. Ct. Rep. 645, we adjudge that the issue of fact involving the right of possession of the premises in dispute could not properly be determined without the aid of a jury, unless a jury was waived. Without repeating what was said in that opinion we also hold that the case made by the Plaintiff was not such as to entitle him to a mandatory injunction."

The Court will observe that both cases above referred to involved the right of possession to land the title to which was in the United States, and in each case the rights of the parties had been passed upon by the Interior Department upon application for patent and every question raised had been previously decided against the Defendant and in favor of the Plaintiff and yet the Court held that the case was not one where equity would intervene and grant a mandatory injunction, and we insist that this of Appelant's is one showing much stronger reasons why Appellee is not entitled to a mandatory injunction.

Regarding the validity of the purported lease we insist that it is void.

First: For the reason that Little Koniuji Island never was and is not now under the jurisdiction of the Department of Commerce and Labor and for that reason, that Department had no authority to grant the lease.

Second: That if said island was under the Department of Commerce and Labor that it was with-

out authority to grant a lease to the island.

Third: If it did have authority to lease the island, the authority only authorized the Department to grant a lease to the person actually in the possession of the island and occupying and using it for the purpose of propagating foxes thereon.

Regarding the contention that the island never had been and was not at the time the purported lease was granted under the jurisdiction of the Department of Commerce and Labor, we call the Court's attention to the fact that the statutes of the United States places all public lands under the jurisdiction of the Department of the Interior and when Alaska was ceded to the United States, all public lands passed automatically under the jurisdiction of the Interior Department by virtue of that statute; true a little tract of land at Sitka and perhaps a little tract at one or two other places in Alaska which was occupied by the military and reserved for that purpose passed under the jurisdiction of the War Department but Little Koniuji Island was not included in any of them, and with all other public lands passed under the jurisdiction of the Department of the Interior and being placed there by a statute of the United States, it could not be removed from that department by Executive order in absence of statutory authority which we contend does not exist.

We do not dispute the fact that the President of the United States always has had the inherent power to make reservations for specific purposes but the authority to create the reserve did not give him the authority to transfer the land so reserved from the Interior Department to another depart-

ment, if there was a statute which provided that land reserved for a specific purpose, should be under a certain department, The land so reserved would by virtue of that statute automatically pass under the jurisdiction of the department to which the jurisdiction was given; In other words, it would be the statute that made the transfer not the order of the President, the order making the reserve was simply the means by which the statute operated. The same principal applies to a reservation by statute, if the statute simply creates the reserve but makes no provision for the transfer of the land included in the reserve to another department it remains under the jurisdiction of the Interior Department unless there is in existence at the time the reserve was made, a statute which provided that lands reserved for that purpose should be under the supervision of a certain department in which case the land so reserved would automatically pass to the jurisdiction of that department. But an executive order by the President would neither add to nor diminish the force or effect of the statute, unless such order is expressly or by clear inference authorized by statute. But Appellee will insist that Little Koniuji Island and all other Islands occupied or leased in Alaska for the purpose of propogating foxes have been under the supervision and control of other departments, first under the department of the Treasury and when the Department of Commerce and Labor was created by Congress, was transferred to that department and was under that department when the purported lease was granted to Appellee. We contend that on the contrary neither of said departments ever had jurisdiction over them and es-

pecially over Little Koniuji.

In order that the court may more clearly understand our contention, we will briefly state a little of the early history of Alaska.

When Alaska was first ceded to the United States, Congress considered it of too little value to waste time investigating its possibilities or ascertain it's wants and needs. Apparently the only thing of value in Alaska was the Pribiloff Islands which had some value on account on seal rookeries thereon, and those islands were accordingly reserved by statute and on account of the Revenue Cutter service being under the jurisdiction of the Secretary of the Treasury, the Pribiloff Islands were placed under the supervision of the Treasury Department. This was done in order that the Revenue Cutter service could patrol the islands and protect the seals. At about this time the U. S. Courts in San Francisco and a little later also the U. S. Courts in Washington and Oregon were given concurrent jurisdiction to try cases coming from Alaska. But the Revenue Cutter service was the only means any department had of exercising or enforcing its jurisdiction in Alaska. There are hundreds of small rocky islands in Southwestern Alaska which were apparently of no value and certainly not for agriculture for most of them were incapable of being cultivated. But vast numbers of sea birds nested and reared their young upon those silands each spring and summer, which furnished ideal food for rearing young foxes and the fish in the surrounding water could be caught and fed to the foxes the balance of the year. There were no foxes on those small islands

and their distance from other islands or adjacent land was such that foxes could not swim to or from them, and the idea was conceived that those islands would make ideal fox ranches. Domesticated Blue Foxes were brought from Eastern Canada and placed on some of the islands, the owner residing there and caring for them. The experiment proved a success and in a few years there were a great many of the islands taken up and occupied as fox ranches; but some of the islands which were not too remote from some settlement to prevent small sailing boats reaching them were annoyed by persons who would go to the island, set up a tent, stake a tract of land and claim a squatters right for a prospective homestealer when the law permitted homesteads in Alaska. But his real object was to have as excuse to remain there and steal the ranchers foxes. By this time there was a Court established at Sitka but this Court was not as accessible as the Court in San Francisco, Seattle or Portland for the reason that at that time the only communication between Sitka and thes islands was by way of Seattle or San Francisco. The Department of Justice was impotent so was the Department of the Interior. Congress hal not yet awakened to the neels of Alaska and would do nothing. The Treasury Department by means of its Revenue Cutter service, which it maintained in Alaska, was the only department that had any potent means of inforceing law and order among those islands.

The Secretary of the Interior seeing the importance of the Fox Industry if sufficiently protected, requested the Secretary of the Treasury as a mat-

ter of comity between departments to afford what protection he could to the Fox ranchers until some action of Congress could be secured; through the comity between the departments, at the suggestion of the Captains of the Revenue Cutters the system of granting yearly permits for the nominal sum of One hundred dollars, to such of the Fox Ranchers as desired or needed protection. The permits were never obligatory; but when a permit was granted if anyone went upon the island against the wishes of the person holding the permit, a Revenue Cutter would call at the island, arrest the intruder and if he had any Blue Fox skins, they were given to the rancher and the intruder was locked up in the forecastle until the Captain of the Cutter felt disposed to release him. This summary manner of dealing out Justice was certainly effective and had the desired effect.

But this permit was never granted to anyone but the actual occupant of the island, and then only when he was actually engaged in propogating foxes. The custom was universal and permits were never granted to half the islands that were used for propogating foxes, for the reason, that the rancher was not bothered with intruders and therefore did not request protection.

Congress awoke for the first time in the year 1898 and on May 14th of that year passed an Act extending the Homestead law to Alaska and in the same Act made provisions for acquiring rights of way for railroads in Alaska and in that Act made the following provisions:

"Provided, that the Annette, Pribiloff Islands

and the islands leased or occupied for the propogation of foxes be exempt from the operation of this Act" (It is evident that the physical conditions are such that there was no need for the exemption so far as the right of way for Railroads was concerned), it is therefore evident that Congress made the exemption to prevent intruders from initiating a Homestead location thereby protecting the occupants of the islands, who were actually engaged in propogating foxes.

It is evident that the exception had the desired effect, for the islands have not since that date been bothered with intruders and in 1900 the practice of granting permits was wholly discontinued and no attempt was ever made to lease any of the fox islands until the year 1913, and during that thirteen years the fox industry grew with marvelous rapidity and the value of the foxes on the various islands increased more than two million dollars. It was believed that the exception above quoted was a direct recognition, by Congress of their rights, and that Congress had wisely protected them against intruders but refrained from enacting any further legislation but left the fox ranchers free to develop the industry along the lines that experience dictated.

Congress had justified this belief for it had set a precedent. When gold was discovered in California in 1849, Congress passed no direct legislation for twenty three years, 1872 being the first year that there was any affirmative legislation, and all it did then was to enact the rules and regulations made by the miners which the courts of California had already recognized and enforced, but Congress did

except all mineral lands from the operation of the Homestead law, when the homestead right was extended to the public lands of California, and Congress has ever since exempted mineral lands from the operation of the Homestead Law but the first time, excepting land from the operation of the Homestead, law was construed as creating a reserve of the land so exempted was in the opinion given by Attorney General Moody, rendered June 24th, 1905, Vol. 25 of opinions of Attorney General, Page 497.

We will consider this opinion of the Attorney General at another place in our brief, but at this time we call the attention of the Court to the fact that it was eight years after Attorney General Moody rendered that opinion, that it was acted upon by the department, and not until after there was a change in the political administration, when another political party assumed the duties of the various departments. All of the old and experienced men who were familiar with the conditions in Alaska had been removed and their places filled with men who had never seen Alaska, and who had no idea of conditions or knowledge of propogating foxes. After President Wilson assumed the duties of his office in his first term, and had selected his cabinet, a Dr. E. Lester Jones was appointed Deputy Commissioner of Fisheries, and assumed the duties of his office. He did not wait until he could visit Alaska and become familiar with conditions here, but immediately attempted to put into operation, some wonderful theories formed in his mind with regard to the propogation of foxes and the conduct of the Fisheries

in Alaska. In delving in the Archives of the Department, he found a few copies of old letters regarding the granting of permits to occupy some of the islands of Alaska for propogating foxes. These were permits from year to year, but by further research, he found this opinion of Attorney General Moody. He at once caused a notice calling for bids for some fifteen or twenty islands for a five years lease for propogating foxes, to be published; the minimum price being two hundred dollars per year. Bids were submitted on but four islands, namely; Carlson, Middleton, Simeonof and Little Koniuji.

Of the first three, only the occupant of the island submitted a bid, and the lease was executed to him; but to Little Koniuji, there were two bids. The occupant Appellant, through his agent, submitted the minimum bid, two hundred dollars per year. and Andrew Grosvold, the Appellee, submitted a bid of two hundred and five dollars per year and a lease or purported lease, was accordingly granted to Appellee.

During the summer of 1914, Dr. E. Lester Jones visited Alaska to investigate the Fox and Fishing Industries, and upon completing the investigation, frankly admits that the attempt to lease the islands for propogating foxes was a grave mistake. (See report of Alaska investigations in 1914 by E. Lester Jones, Deputy Commissioner of Fisheries, December 12th, 1914, page 116.)

This is a public document of which the Court can take judicial knowledge. Fox farming cannot be successful without permitting the foxes to run at large on the island, and as Mr. Jones states in his re-

port, it will require five years after stocking an island, before the rancher can hope to get returns. At that time, what happens, is that the island is again advertised for bids to be leased for another five years. It is impossible for the present occupant to capture and remove all his foxes. He is confronted with the same thing that happened in this case.

Some one familiar with the facts can estimate how many foxes there are on the island, and within the short time the occupant will have to remove them, not to exceed half of them can be removed. A man with an elastic conscience will figure that he can bid one-fourth the value of the foxes on the island; secure the lease; dispossess the occupant before he can remove half the foxes. He pays one year's rent, goes to work and traps all the foxes he can during the first season, he may fail to pay the next year's rent. But he is in possession of the island, and before the government can dispossess him, he has depleted the island of foxes, including the natural increases since leasing. He is too wise to be caught as he caught the other fellow. The result is, the first occupant of the island, in order to have any assurance that he will secure the lease for another term, must bid an amount per year equal to one-fourth the value of his foxes, and it must also be remembered that the first occupant has constructed a dwelling house and storage houses and other improvements which probably cost him fifteen hundred or two thousand dollars. The cost of removing them and the deterioration of the material would be so great that he could not remove them even if permitted to do so.

It becomes evident that the industry cannot survive such adverse conditions. It has already been severely affected for the ranchers realize that if the court sustains this lease, they are subject at any time to have their business ruined by some visionary whim of a department agent.

We do not call the attention of the Court to the physical conditions surrounding the fox industry on the islands of Alaska, with the idea that the Court can legislate, or that it would or should influence the Court in deciding the case against the law, but the Court is called upon in this case to interpret a statute which in our opinion is capable of two constructions, one of which will protect an important industry and the property rights of those engaged in that industry; the other construction will kill the industry and greatly depreciate the property rights which have been acquired thereunder.

It is our contention that the Court should give this statute the construction that will protect the industry and the property right connected herewith, if such construction will not do violence to the statute; that the Court will presume that Congress was in possession of all the facts when it passed the legislation, and that it did not intend to impair the industry or the property right thereunder, unless the contrary clearly appears from the context of the statute

If the contention of Appellee is corect, then that provision of the statute created two distinct classes of right on the various islands. Those islands which had been occupied for the purpose of propagating foxes thereon but had never been leased prior to the enactment of that statute, (May 14, 1898) are not subject to lease and the rights of the

occupant are secured to him by virtue of that statute and the department is powerless to interfere with him in the enjoyment of those rights; while the islands which had been leased prior to that time are, by that statute, made subject to the whims and experiments of the department without any rights whatever. Notice the wording of the statute:

> "And the islands leased or occupied for the purpose of propagating foxes be exempt from the operation of this act."

It is certainly apparent from the context of the statute that those islands that were occupied for the purpose of propagating foxes thereon, are exempt from the operation of this act the same as those which had been leased prior thereto. It is evident that no homestead right can attach to either. The act protects the occupants of the islands not leased the same as those that were leased, from intruders locating thereon under the pretext of initiating a homestead and this construction of that statute has been universally accepted by the inhabitants of Alaska. Since its enactment there has never been an instance where any one has attempted to interefere or question the right of possession of the occupant of one of those islands, whether leased or occupied. As we have previously stated, that act abolished the evil, which the permit or lease was intended to prevent, and the logical conclusion would seem to be that Congress did not intend to ratify an illegal custom, the necessity for which the act effectually eliminated.

But if it was conceded that the act did ratify the custom of granting yearly permits or leases to

the occupants of those islands to which permits or leases had been granted previous to the enactment of the statute; that construction could not benefit Appellee or render his lease valid, for the reason that his lease was not granted in compliance with that custom, but the manner in which it was granted and the party to whom it was granted, was a radical departure from that custom, and it is not reasonable to believe that Congress anticipated that the Act would or could be so constructed as to authorize such a radical departure from the custom which the Act is supposed to have ratified.

Webster defines the word RATIFY—"To mean; To approve and sanction; to make valid; to confirm; to establish; to settle; especially to give saction to, as something done by an agent or servant; as to ratify an agreement or treaty.

To ratify a thing is to accept that which has been done and the manner and method in which it was done, and any substantial departure therefrom, thereafter, renders the ratification void. So it is with the ratification of a custom; any substantial departure from that custom is void for the reason that the thing done was not done in compliance with the custom which had been ratified. Neither does the opinion of Attorney General Moody (above referred to) bear out the contentions of Appellee. In the opinion of the attorney, he uses the following language:

> "It appears that beginning in 1882 and since that time the Secretary of the Treasury of the Treasury assumed and exercised authority to lease various islands in the waters of

Alaska for the propogation of foxes. Such action seems to have been without statuatory sanction, but in the Act of May 14, 1898 (30 stat. 409, 413) extending the homestead laws to Alaska, Congress incorporated the following provision: Provided, that the Annette, Pribiloff Islands leased or occupied for the propogation of foxes, be excepted from the operation of this Act. It is not suggested that the authority of the Secretary of the Treasury in the premises was ever questioned, and such an uninterrupted and long continued practise, supported by the above quoted statuatory evidence of legislative acquiescence seems to clearly establish the authority of the Secretary of the Treasury to continue leasing, for this purpose such islands in Alaska, as had been so leased by him prior to the Act of May 14, 1898."

This opinion does not discuss the form of the lease nor the method of leasing. The attention of the Attorney General was not called to these matters, nor does the opinion bear out the contention of the Appellee, that the Act authorized the granting of a lease to persons other than the occupant thereof. All that opinion held, was that the statute authorized the Secretary of the Treasury to continue the custom of leasing, which, prior thereto, was illegal; but it is not intimated in the opinion that a substantial departure from the established custom of leasing was sanctioned by that statute.

It must also be borne in mind that the Attorney General, in rendering that opinion, was rendering it upon a hypothetical case, presented to him by the

Treasury Department. It does not appear that he was informed as to the method of leasing, or that his attention was called to any of the details, and he certainly was not informed as to the reasons for first starting the custom. Neither was his attention called the fact that the statute he was considering had abolished the evil which the lease or permit was intended to prevent and had that point been presented to the Attorney General before rendering the opinion, it is probable he would have arrived at the opposite conclusion: but all that opinion seems to hold is that the above quoted statute simply ratifies the previously illegal custom.

The evidence clearly shows, (and it is not disputed by Appellee) that the only custom followed by the Department was that of granting a permit to the occupant of an island, for a period of one year, at the yearly rental of one hundred dollars, and that the permit was never granted to any one but the occupant of the island. (See testimony of J. L. Green, pages 128-129 and 130 of record). The evidence also shows that the Treasury Department never advertised for bids to lease any fox island in Alaska, and never offered to lease one until occupied by someone, for the purpose of propogating foxes and only to that occupant.

Appellee is an old timer in that part of Alaska and the evidence shows that he occupied several islands, using them for propogating foxes, and had the Secretary of the Treasury ever advertised for applicants to lease any of the fox islands, he would have known it. Or if an island had ever been leased by that Department to any one but the occupant, he would have known it, and would have so stated on

the witness stand.

You will also observe that not one of the islands occupied by Appellee was leased. (See report of E. Lester Jones, Deputy Commissioner of Fisheries for year 1914 Page 116). We submit that we have clearly established the fact, that the lease, or purported lease, to Appellee, was a radical departure from the custom of granting permits or leases practiced by the Treasury Department prior to the act of 1898, above referred to, and should the court find that this statute ratified the previous custom, it cannot sustain this lease for the evidence of both Appelant and Appellee shows that Appellant was occupying Little Koniuji, using it for propogating foxes thereon, and the legal owner of the foxes and improvements thereon, when said island was advertised to be leased, and when the lease was granted and executed; and that Appellee had no interest in said island or to the foxes or improvements situated thereon, and no right to the possession thereof.

It seems to be conceded by Appellee that the Secretary of Commerce and Labor had no authority to lease any fox island in Alaska which had not been leased prior to the Act of ay 14, 1898. This is also conceded in the opinion of the Attorney General; therefore, if Little Koniuji Island had not been leased prior to that time, this lease, or purported lease to Appellee, is void. Appellant in his answer (page 18 of record) denies that said island was ever leased by the United States, or attempted to be leased prior to May 14, 1898, or at any time since except the present purported lease to Appellee; and a careful examination of the record discloses the

fact that there is no legal evidence that said island ever was leased at any time prior to the granting of the purported lease in controversy. The only attempt Appellee made to prove that the island had been leased prior o the Act of May 14, 1898, are the copies of three unsigned letters addressed to Rudolph Newman, bearing dates respectively February 26, 1896, February 24, 1897, and May 12, 1898. These three letters with two others, dated respectively May 29, 1899 and August 21st, 1900, were all offered in evidence by Appellee at the same time, and are marked Plaintiff's Exhibit "E". (See pages 178-179-180-181-182-183-184 and 185 of Record). The letters are exact copies of each other, with the exception of the dates. There is no signature to any one of them. There is no evidence that any one of them was ever mailed. There is no evidence that Mr. Newman ever received the letters, or any one of them, and there is no evidence that Mr. Newman ever acted upon them. It is certainly apparent that those letters are no evidence that Little Koniuji was ever leased prior to May 14th, 1898, or at any time. Neither do the certificates attached to said letters add anything to their weight as testimony. The certificates are the same to each letter. Therefore, we will refer to the certificates attached to the first letter. The certificate is that of H. M. Smith, Commissioner of Fisheries and is as follows:

"Department of Commerce, Washington,
May 1st, 1916.

"I hereby certify that the annexed is a true copy of the original letter to Mr. Rudolph Newman, Unalaska, Alaska, dated February 26th,

1896 on file in the Bureau of Fisheries.

H. M. SMITH,
Commissioner ofFisheries."

(See page 178 of Record.)

The certificate simply certifies that this is a true copy of the original letetr on file in that office. It is evident that the original letter was never signed or mailed; neither is there any evidence, that the yearly rental was ever collected or paid into the United States Treasury. If those unsigned letters are of any value as evidence, they would create the inference that the Island never had been leased, for had the money been received, the letter would have been signed and mailed, and the records of the department would have shown that fact. It is a well known fact that there is a record of every dollar paid into any of the departments, and had Rudolph Newman ever paid any rent for said Island that fact could have been shown from the records of the department, and the date paid.

We therefore insist that the unsigned letters are evidence that Mr. Newman never acted upon them, and the island was never leased, and we insist had Rudolph Newman ever leased the island Appellee would have had the certified copies of the records of the department showing that it had been leased and also showing that the rental therefor hal been paid, and the fact that Appellee has produced only those unsigned letters, creates a very strong presumption that there is no record of the island having been leased, or any rental therefor paid to the government; for if such had been in existence, counsel for Appellee, would have produced it.

The Court in its opinion holds that the department had no authority to lease any island that had not been leased prior to the act of May 14th, 1898; We quote an extract from its opinion:

> "As Little Naked (Koniuji) Island at the time of the passage of this act, was under lease by the Secretary of the Treasury for the purpose of propogating foxes; it was clearly thereby severed from the mass of the public lands, for the manifest purpose that it might be continued to be leased as theretofore." (Page 206 of record.)

It is very evident that there is no evidence to support the conclusion that Little Koniuji Island had ever been leased for any purpose prior to the Act of May 14th, 1898, or at all, until the purported lease was granted to Appellee and that the Court has erred in so holding, and the judgment of the Court being based upon that false assumption it should be reversed.

Before leaving this subject, we call attention to the following paragraph of the Court's opinion:

> "Furthermore, it does ot appear that the Defendant is in a position to question the right or authority; whatever rights he or his principal may have had were those of a trespasser only, and he or his principal were fully advised on the intention to lease the island and submitted bid theefore." (Page 207 of Record).

This is the first time we have ever seen the principal announced, that a person occupying a part of the public domain, engaged in a lawful and laudible occupation or industry, was estoped from defending

his rights, whatever they were, because he was occupying a part of the public domain.

If the principle above stated, by the Court, is the law, ninety-five per cent. of the property rights in Alaska is in a percarious condition.

Ever since the discovery of gold on the public domain in California, the courts have consistently held that while a person on the public domain without statutory authority, is technically a trespasser, that no one but the United States Government can raise that question, and that another party claiming the right of possession, cannot prevail on the weakness of his adversary's right, but on the strength of his own right, and that before he can prevail, he must affirmatively establish by a preponderance of the evidence, that he has a better right to possession than the defendant; In this case before Appellee can prevail, he must establish the validity of his purported lease by a clear preponderance of the evidence, if he fails to establish the validity of the lease by a clear preponderance of the evidence, he has failed to show that he had a better right to the island than Appellant, and he must fail in his suit.

The fact that Appellee exhibits a purported lease signed by some agent of the United States does not change the rule of law, and we insist that Appellant cannot be disturbed in his possession of the island, until Appellee has affirmatively shown first; That the Department of Commerce and Labor was authorized by law to lease the island; Second, that it had a right to lease it to some one other than the occupant thereof, or that Apppellant was not occupying the island at the time the lease was granted;

Third, he must show that the party signing the lease on behalf of the Government was duly authorized to so sign, and in case he shall fail to establish any one of the three propositions, he must fail in his action.

The Court in its opinion seems to hold that the fact that Appellant tendered a bid for the island estops him from questioning the validity of the lease; We certainly cannot agree with the Court in this contention, Appellant explained in his answer, that he made the bid in order that he might not be disturbed in his possession. Here in Alaska, owing to the remoteness of the Courts, and expense of litigation, it was much cheaper to pay the two hundred dollars a year, than be forced into litigation, and in this case, it would have been cheaper to have bid five hundred dollars per year than defray the cost of this suit if successful, and it was possible the Court would hold that the Department did have a right to lease the island to the occupant thereof, in which case if he did not tender the minimum bid, knowing it was offered for lease, he might be estopped from questioning the validity of a lease granted some one else on the ground that he had waived his right by not tendering to the Department the minimum for which it was offered to be leased, and we contend that instead of the fact that Appellant tendered a bid being against him, that it shows good faith on his part, and should be decidedly in his favor.

Regarding the foxes and other property on the islands belonging to Appellant at the time the court rendered its judgment, granting a preemptory injunction without giving Appellant any time what-

ever to remove the same, is certainly a mistake and is a confiscation of Appellant's property.

The evidence clearly shows, by Appellant and his witnesses and by one of Appellee's witnesses that Appellant had about one hundred and thirty pair of foxes on the island when the Court granted the preemptory injunction, which were worth nine or ten thousand dollars and improvements worth a thousand dollars or more; that Appellant had on the island, at the time the Court granted the preemptory injunction, about 130 pair of foxes, worth approximately ten thousand dollars; Appellant testified as follows: (Pages 85 and 86 of Record):

Q. How many foxes are on the island now?

A. Approximately 130 pair.

Q. How many were there in March of this year?

A. Approximately about 70 pair (see page 85 of Record))

And on page 86, Appellant testifies as follows:

Q. How long a time would it take you to get 130 foxes off?

A. Two trapping seasons.

Q. You say there are 130 pair on the island, now that includes the increase of the breeding season this spring?

A. I mean to say at the present time there are 130 pairs of foxes as far as I know.

Q. Did you ever make any agreement with Grosvold that you would relinquish the island to him or any of the foxes upon it.

A. I did not.

Page 75 of Record Appellant testifies as follows:

"A. We would have a breeding season in June which would be an increase of one hundred per cent so in answering that question I would have to go to answer it including the increase."

I quote the above to explain how Appellant had one hundred and thirty pair of foxes on Little Koniuji Island in July, when the case was tried when he only had seventy pair of foxes on the island in March of that year.

The evidence is uncontradicted that the pelts of mature foxes are worth sixty dollars apiece, and the value of seventy pair (one hundred foand rty pelts) at sixty dollars per pelt is worth eight thousand four hundred dollars, and the young foxes would be worth not less than two thousand dollars, making the total value of the foxes on the island, at the time the judgment was rendered, which belonged to the Appellant, worth the sum of ten thousand four hundred dollars.

These facts are not disputed by Appellee, but he does make an effort to show that one Chelcy Colwell was authorized by a corporation by the name of [illegible]dy Fox Company, to treat with Appellee and that he did agree to give Appellee all the foxes left on the island after September First, 1914, and attempted to further show that the foxes on the island really belonged to the said Fundy Fox Company, and in attempting to do this, Appellee, has incumbered the Record with a number of letters and the articles of incorporation of the said Fundy Fox Company and with other documents, none of which connect the said Fundy Fox Company with the foxes or improvements on the island or tend to show that said com-

pany had any interest in said foxes or improvements on said island, neither do they show that the said Chelcy Colwell had any right to negotiate with Appellee in any manner whatever, with regard to the foxes or improvements on said island.

Appellee also took the deposition of F. E. Williams, a resident of St. John's, New Brunswick, Canada, but this deposition is positively against him, it will be remembered that the F. E. Williams is the author of some letters, above referred to, which was introduced in evidence by Appellee; We quote from the testimony of F. E. Williams, beginning on page 169 of Record.

"Answer to Interrogatory No. 4, I was sec-
"retary and manager at the east end of Fundy
"Fox Company, unincorporated.

Quoting from page 170 of Record.

"Interrogatory No. 5. Was the Fundy Fox
"Company dissolved and succeeded by Fundy
"Fox Company Limited?

"Answer to Interrogatory No. 5, Yes.

"Interrogatory No. 9. State whether or
"not the Fundy Fox Company was engaged in
"the propagating of foxes on Little Koniuji Is-
"land of the Shumagin group, Territory of Alas-
"ka, during the period mentioned in interroga-
"tory two or any part of said period?

"Answer to Interrogatory No. 9. No, never.

"Interrogatory No. 11. After the dissolu-
"tion of the Fundy Fox Company and the suc-
"cession thereto by the Fundy Fox Company,